(4)

No. 06-1082

FILED

JUN 8 - 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
# Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

*Petitioner,*

v.

DAVID LEE MOORE,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia**

## REPLY BRIEF FOR PETITIONER


ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
*Counsel of Record*

STEPHEN R. MCCULLOUGH
Deputy State
Solicitor General

WILLIAM C. MIMS
Chief Deputy
Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

LEAH A. DARRON
Senior Assistant
Attorney General

OFFICE OF THE ATTORNEY
GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

*Counsel for the*
*Commonwealth of Virginia*


June 8, 2007


COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

I. STATE AND FEDERAL COURTS ARE CLEARLY DIVIDED OVER THE ISSUE PRESENTED IN THIS CASE ..... 1

II. MOORE'S DISCUSSION OF THIS COURT'S JURISPRUDENCE FURTHER DEMONSTRATES THE NEED TO GRANT CERTIORARI ..... 6

III. MOORE'S POLICY ARGUMENTS DO NOT DIMINISH THE IMPORTANCE OF THE CASE ..... 8

CONCLUSION ..... 10

# TABLE OF AUTHORITIES

Page

CASES

*Atwater v. City of Lago Vista*,
32 U.S. 318 (2001) ..... 8, 9

*California v. Greenwood*,
486 U.S. 35 (1988) ..... 7, 8

*California v. McKay*,
41 P.3d 59 (Cal. 2002) ..... 3, 4, 5, 7

*Colorado v. Hamilton*,
666 P.2d 152 (Colo. 1983) ..... 3

*Elkins v. United States*,
364 U.S. 206 (1960) ..... 7

*Johnson v. United States*,
333 U.S. 10 (1948) ..... 7

*Knowles v. Iowa*,
525 U.S. 113 (1998) ..... 5, 6

*North Carolina v. Eubanks*,
196 S.E.2d 706 (N.C. 1973) ..... 5

*Ohio v. Droste*,
697 N.E.2d 620 (Ohio 1998) ..... 5

*United States v. Bell*,
54 F.3d 502 (8th Cir. 1995) ..... 2, 5

*United States v. Di Re*,
332 U.S. 581 (1948) ..... 2, 3, 7, 8

*United States v. Miller*,
452 F.2d 731 (10th Cir. 1971) ..... 3, 5

*United States v. Mota*,
982 F.2d 1384 (9th Cir. 1992) ..... 3, 4, 7, 8

TABLE OF AUTHORITIES – Continued

Page

*United States v. Robinson*,
414 U.S. 218 (1973) ..... 3, 6, 7

*United States v. Walker*,
960 F.2d 409 (5th Cir. 1992) ..... 2, 7

*United States v. Wright*,
16 F.3d 1429 (6th Cir. 1994) ..... 2, 7

*Wyoming v. Houghton*,
526 U.S. 295 (1999) ..... 9

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV ..... 1

STATUTES

*Virginia Code* § 18.2-11 ..... 9

*Virginia Code* § 18.2-57 ..... 9

*Virginia Code* § 18.2-248.1 ..... 9

*Virginia Code* § 19.2-74 ..... 9

*Virginia Code* § 46.2-301 ..... 9

OTHER AUTHORITY

1 Wayne R. LaFave,
*Search and Seizure*, § 1.5(b) (4th ed. 1996) ..... 4, 7

## REPLY BRIEF OF PETITIONER

### I. STATE AND FEDERAL COURTS ARE CLEARLY DIVIDED OVER THE ISSUE PRESENTED IN THIS CASE.

The question presented in the case is whether "the Fourth Amendment require[s] the suppression of evidence obtained incident to an arrest that is based upon probable cause, where the arrest violates a provision of state law." Pet. i. Even Respondent Moore acknowledges that, while the Virginia Supreme Court and the Ninth Circuit have ruled that the answer to this question is yes, four federal courts of appeal and two state supreme courts have ruled that the answer to this question is no. *See* Br. in Opp. 8-9 & n.3, 13 n.8 (listing cases from the Fifth, Sixth, Eighth, and Tenth Circuits and the California and Colorado Supreme Courts holding that evidence obtained in a search incident to an arrest founded upon probable cause but made in violation of state law should not be suppressed). This deep and mature conflict among the courts warrants this Court's review.

Moore seeks to minimize the conflict in several ways, none of which is availing. Moore chiefly takes issue with the reasoning of the federal and state courts that rejected motions to suppress based on state law violations. In particular, Moore asserts that those courts rejected the suppression motion based solely on their conclusion that the state law violation did not make the arrest itself unconstitutional; they did not "confront the argument . . . that an arrest in violation of state law, while not unconstitutional in itself, does not provide a basis for invoking the search incident to arrest exception." Br. in Opp. 8-9. This argument fails on a number of levels. Most fundamentally, those courts squarely addressed the question presented here and reached a conclusion opposite

that of the Virginia Supreme Court. It is therefore the law of those circuits and States that evidence will *not* be suppressed when it is found incident to an arrest based on probable cause but in violation of state law. Respondent may be disappointed by the reasoning of those courts, but that does not change their outcome. They definitively resolved the issue in a manner adverse to Moore's position.

Thus, in *United States v. Walker*, 960 F.2d 409, 415 (5th Cir. 1992), the defendant "contend[ed] that the physical evidence and confession were fruits of an arrest that was unlawful under Texas law and, as such, should be suppressed." The Fifth Circuit rejected that argument, holding that "in determining whether to suppress the evidence at issue, the inquiry is whether the officers had probable cause to arrest" the defendant. *Id.* at 416. The Fifth Circuit rule could not be clearer – or in more direct conflict with the Virginia Supreme Court's rule. Likewise, in *United States v. Wright*, 16 F.3d 1429, 1434 (6th Cir. 1994), the court addressed the defendant's contention that *United States v. Di Re*, 332 U.S. 581 (1947) – the principal case relied on by Moore, *see* Br. in Opp. 18-20 – establishes "that state law determines the validity of the arrest for purposes of determining whether evidence seized incident to the arrest is admissible." The Sixth Circuit disagreed, holding that the "reasoning of *Di Re* no longer applies"; "[t]he fact that the arrest . . . may have violated state law is irrelevant as long as the standards developed under the Federal Constitution were not offended." *Id.* at 1436, 1437. The Sixth Circuit answer to the question presented is crystal clear and, again, in direct conflict with the Virginia Supreme Court's answer. *See also United States v. Bell*, 54 F.3d 502, 504 (8th Cir. 1995) (rejecting defendant's contention that evidence obtained incident to his arrest should be suppressed because Iowa law does not authorize arrest for operating a bicycle without a

headlight); *United States v. Miller*, 452 F.2d 731, 733 (10th Cir. 1971) (rejecting argument that, under *Di Re*, evidence obtained incident to arrest should be suppressed because Oklahoma officers did not have the authority to make a warrantless arrest for a misdemeanor not committed in their presence); *Colorado v. Hamilton*, 666 P.2d 152, 157 (Colo. 1983) (rejecting argument that evidence obtained incident to arrest made in Denver should be suppressed because the officers had no authority to arrest in that city).

The direct conflict between the California Supreme Court and the Ninth Circuit further illustrates the basic conflict on the question presented. In *United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1992), the Ninth Circuit relied on *Di Re* to conclude that evidence (counterfeit currency) had to be suppressed because it was obtained incident to an arrest for operating a business without a license, which in California was not an arrestable offense. In *California v. McKay*, 41 P.3d 59 (Cal. 2002), the California Supreme Court addressed a near-identical situation: whether a bag of drugs found incident to an arrest for a misdemeanor should be excluded on the ground that, under California law, the misdemeanor was not an arrestable offense. The Court reviewed *Mota*'s reasoning at length and concluded it was "unpersuasive." *Id.* at 70. The Court first held that "the constitutionality of the arrest does not depend upon compliance with state procedures that are not themselves compelled by the Constitution." *Id.* at 69 (citing numerous federal and state court opinions reaching same conclusion). The Court then specifically rejected the contention – echoed by Moore here – that the issue (and *Mota*'s reasoning) can also be cast as follows: "though the arrest was constitutional despite the violation of state law, the incidental search was not because [*United States v. Robinson*, 414 U.S. 218 (1973)] imposes as a prerequisite

not just a constitutional arrest but, more demandingly, a 'lawful custodial arrest.'" *Id.* at 70 (quoting 1 LaFave, *Search and Seizure*, § 1.5(b), p. 141). The California Supreme Court agreed with Professor LaFave that this Court's use of the phrase "lawful custodial arrest" in *Robinson* "refers not to the limitations of state law but rather to an overarching principle that all it takes to make a custodial arrest reasonable in a Fourth Amendment sense is that it be based on probable cause." *Id.* (quoting 1 LaFave, *Search and Seizure*, § 1.5(b), p. 141-142). The Court added that "[c]onditioning a search incident to arrest on the degree to which an otherwise constitutional arrest complies with state procedure, moreover, makes no sense. . . ." Moore's contention that "there is no relevant conflict between" *McKay* and *Mota* on the question presented in this case, Br. in Opp. 10 n.5, is therefore untenable.

As can be seen, Moore's assertion that these decisions focused solely on the constitutionality *vel non* of the arrest, rather than the suppression of evidence, is flatly wrong. Moreover, the distinction he seeks to draw between illegal arrests and unconstitutional arrests would not have affected the outcome of any of these cases. Regardless of whether the arrest is labeled "illegal" or "unconstitutional," the foundational question before the many courts that have addressed this issue remained whether the Fourth Amendment required that a search incident to an arrest that violated state law had to be suppressed. Moore does not – and could not – suggest that the elusive distinction he makes would have had any bearing on the outcome of the many cases cited in the Petition as establishing the conflict.

Moore also seeks to minimize the conflict among the lower courts on the ground that they "do not involve searches incident to arrests for *citation-only* offenses, which were the only kinds of searches addressed by the decision in this case."

Br. in Opp. 5. As an initial matter, that distinction is irrelevant. The nature of the state law limit on the officer's authority to arrest does not affect the resolution of the narrow question of constitutional law presented by this case. Whether the arrest is invalid under state law because the officer arrested beyond his jurisdictional boundary, or whether the arrest is invalid because the officer arrested for a misdemeanor in violation of the state law, the analysis proceeds in exactly the same fashion. Furthermore, contrary to Moore's assertion, several of the decisions that conflict with the Virginia Supreme Court (and Ninth Circuit) decisions *did* involve efforts to suppress evidence obtained incident to arrests for misdemeanor offenses for which state law did not authorize arrest. *See, e.g.*, *Bell*, 54 F.3d at 504; *Miller*, 452 F.2d at 733; *McKay*, 41 P.3d at 64. Thus, even if the issue were sliced every bit as thinly as Moore would like, there remains an intractable conflict among the courts.[1]

Moore further notes that many lower courts that have faced this issue have not addressed *Knowles v. Iowa,* 525 U.S. 113 (1998), and he urges this Court to allow lower courts to consider the impact of *Knowles*. Br. in Opp. 8. That suggestion should be rejected because *Knowles* is irrelevant.

---

[1] Moore also seeks to cast out of the conflict cases – such as *Ohio v. Droste*, 697 N.E.2d 620, 623 (Ohio 1998), and *North Carolina v. Eubanks*, 196 S.E.2d 706, 709 (N.C. 1973), *cited in* Pet. 11 – where searches were not conducted. These cases involved unsuccessful efforts by defendants to suppress evidence (such as breathalyzer results) obtained following arrests for drunk driving that were made in violation of state law. In each case, the state supreme court held that suppression was unwarranted because the arrest was made with probable cause, *i.e.*, in conformity with federal constitutional requirements. Those holdings cannot be reconciled with the Virginia Supreme Court's conclusion that evidence obtained as a consequence of an arrest violating state law must be suppressed. In all events, even if these cases are put to the side, the conflict among the courts is deep and intractable.

*Knowles* held that police may not search incident to a citation because the twin rationales justifying such searches are not present: there is no need to gather evidence and the concern for officer safety is much reduced. *Knowles*, 525 U.S. at 116. Where, as here, the officers actually take a suspect into custody, those two rationales are present. *Knowles* did not resolve the question raised in the case at bar, and Moore does not seriously contend otherwise.

Finally, Moore claims that the Petition does not present "any question of recurring importance." Br. in Opp. 14. This is simply wrong, as the many decisions from State and Federal courts on this very issue attest. State and local law enforcement personnel, who conduct arrests on a daily basis, would greatly benefit from having this issue settled. As the Amicus Brief filed by Texas and thirteen other States explains, the States would greatly benefit from a clear determination of their powers and responsibilities. *See* Texas *et al.* Br. at 16-17. Courts have struggled long enough – and been divided long enough – over this basic issue. There is no reason for further delay.

## II. MOORE'S DISCUSSION OF THIS COURT'S JURISPRUDENCE FURTHER DEMONSTRATES THE NEED TO GRANT CERTIORARI.

On the merits, Moore contends that the holding below rested on settled law from this Court. Br. in Opp. 14-20. He cites *Robinson*, where this Court upheld searches incident to "*lawful*" arrests. Br. in Opp. 16-17 (citing 414 U.S. at 224). This citation to *Robinson* simply begs the question of what constitutes a valid arrest under the United States Constitution, one that would permit a search incident to arrest. As noted in the Petition and above, the overwhelming majority of courts to consider the issue have concluded that

an arrest is lawful, for Fourth Amendment purposes, if it is based on probable cause, regardless of any additional state law strictures. Pet. 9-11. And if the arrest is lawful for federal purposes, any search incident to that arrest would be lawful under *Robinson* and later cases.[2]

Moore also contends that *Di Re* and *Johnson v. United States*, 333 U.S. 10 (1948), set forth a Constitutional standard rooted in State law. This contention is similarly misplaced. A number of courts as well as respected authority have failed to discern any constitutionally rooted holding in *Di Re*. *See Wright*, 16 F.3d at 1435; *Walker*, 960 F.2d at 416; *McKay*, 41 P.3d at 66-67; *see also* 1 Wayne R. LaFave, *Search and Seizure*, § 1.5(b) (4th ed. 1996) ("a close inspection of the *Di Re* decision indicates that the use of state law there was 'based on non-constitutional considerations'"). Moreover, each of those courts concluded that *Di Re* is no longer good law in light of this Court's later holdings in *Elkins v. United States*, 364 U.S. 206, 223-24 (1960), and *California v. Greenwood*, 486 U.S. 35, 43 (1988), which concluded that the constitutional validity of a search does not hinge on matters of state law. *Id.* By contrast, the Ninth Circuit in *Mota* relied on *Di Re* and disagreed with "other circuits [that] have questioned the continued validity of *Di Re* as precedent in light of [later] Supreme Court's

[2] Moore also begs the question when he contends – for the first time in this case – that his arrest was unconstitutional because the officers lacked probable cause to believe Moore had committed an "arrestable offense." Br. in Opp. 28. Unsurprisingly, he does not offer any authority for the proposition that federal law mandates that officers have a double-barreled probable cause: (1) probable cause to believe the suspect committed a particular crime and (2) probable cause to conclude that a particular state law applies. As we argue, the United States Constitution is not concerned with the second type of probable cause. The remedy for violating the state law will hinge on remedies provided by state law, not the United States Constitution.

decisions." *Mota*, 982 F.2d at 1387. This divergent understanding of *Di Re*'s meaning and vitality once again highlights the need for this Court's intervention.

Ultimately, Moore's merits argument only strengthens the need to grant certiorari. If Moore is correct that this Court has long settled the issue, this Court should grant certiorari to bring back into the fold the numerous courts that have strayed from these (purported) holdings. Indeed, the conflict among the lower courts arises largely because of their differing views over this Court's decisions. In *Greenwood*, this Court held that the United States Constitution does not mandate the suppression of evidence obtained in a warrantless search and seizure deemed reasonable under the Fourth Amendment, but "impermissible as a matter of California law." 486 U.S. at 43. Most, but not all, lower courts have held that the same result obtains when it is not the search itself that violates state law, but the predicate arrest. Only this Court can resolve the conflict over whether that is so.

## III. MOORE'S POLICY ARGUMENTS DO NOT DIMINISH THE IMPORTANCE OF THE CASE.

Moore asserts that the rule advocated by the State and adopted by most of the lower courts to consider the issue is one that "invites abuse." Br. in Opp. 14. In fact, the longstanding objective standard of probable cause affords citizens ample protection from arbitrary police exaction. Moreover, as this Court recognized in *Atwater v. Lago Vista*, 532 U.S. 318, 352 (2001), "it is in the interest of police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason." For this reason and others, "[t]he country is not confronting anything like an epidemic of unnecessary minor-offense arrests." *Id.* at 353. Not surprisingly, Moore

has made no showing of any abuses in those jurisdictions that do not suppress evidence obtained incident to arrests made in violation of state law.

Moore also makes the related argument that the Virginia Supreme Court's decision is "consistent with 'traditional standards of reasonableness,'" Br. in Opp. 24 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)), because "[b]alancing individual and governmental interests is quintessentially a legislative function, and the Virginia legislature has struck the balance in favor of freedom from arrest for such minor violations." Br. in Opp. 25. This misses the point. Although the Virginia legislature has spoken on when officers may arrest for certain misdemeanors, it has *not* spoken on the separate question whether evidence should be excluded whenever it is obtained as a result of an arrest made in violation of that limitation. The Virginia General Assembly is, of course, fully capable of providing additional remedies to the citizens subjected to unlawful arrests.[3]

---

[3] It bears adding that Moore has overstated the Virginia legislature's view of the seriousness of the offense in question. The offense of driving on a suspended license can, in fact, be an "arrestable offense." *Virginia Code* § 19.2-74 permits officers to arrest an individual for committing a misdemeanor when, among other things, the suspect presents a danger to himself or others or ceases to discontinue the unlawful act. Therefore, an officer has a measure of discretion to decide whether to make an arrest. Although the state courts rejected the argument here, Virginia contended that Moore was likely to continue the unlawful act of driving on a suspended license since he was caught driving, at night, by himself. Pet. App. 3, 46. In addition, driving on a suspended license is a Class 1 misdemeanor, *Virginia Code* § 46.2-301(C), which carries a maximum punishment of 12 months in prison and a fine of up to $2,500. *Virginia Code* § 18.2-11(a). Class 1 misdemeanors cover a wide range of offenses, including possession of marijuana, *Virginia Code* § 18.2-248.1(a)(1) and assault and battery, *Virginia Code* § 18.2-57(a). By contrast, the underlying infraction in *Atwater* was not wearing a seatbelt, an offense that carried no jail time and exposed the arrestee to, at most, a $50 fine. 532 U.S. at 323.

Because the Virginia legislature has not imposed the exclusionary rule as a remedy for police error of the sort that occurred here, we are left with the question whether the *federal* Constitution imposes such a remedy. In holding that it does, the Virginia Supreme Court misread this Court's precedents and brought itself into conflict with numerous federal courts of appeal and state supreme courts. Review by this Court is warranted.

## CONCLUSION

For the reasons above, in the Petition itself, and in the Amicus Brief of Texas and thirteen States, the Petition for a Writ of Certiorari should be GRANTED.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
*Counsel of Record*

STEPHEN R. MCCULLOUGH
Deputy State Solicitor General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

WILLIAM C. MIMS
Chief Deputy Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

LEAH A. DARRON
Senior Assistant Attorney General

*Counsel for the Petitioners*

June 8, 2007